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IN THE HIGH COURT OF JUDICATURE OF CHHATTISGARH AT BILASPUR.

CRIMINAL APPEAL NO. 1165 / 2003.

APPELLANTS. (IN JAIL CUSTODY) :

1. Ranu Son of Chinta, aged about 60 years, Occupation- Labour, resident of Village- Kumhali, P.S. Nagarnar, Distt.- Baster(C.G.)
2. Praffull Son of Kistakya, aged about 35 years, Occupation- Labour, resident of village- Jadigudapara Markel, P.S. Nagarnar, Distt.- Baster(C.G.)
3. Gangaram Son of Mohan, aged about- 22 years, Occupation- Labour, resident of village- Jadigudapara Markel, P.S.- Nagarnar, Distt.- Baster(C.G.)
4. Paklu Son of Kuleshwer Mati, aged about 50 years, Occupation- Labour, resident of village- Borgaon, Police Chowki- Bade Amda, Distt.- Navarangpur, (Orrissa).
5. Bali Son of Sonadher, aged about 35 years, Occupation- Labour, resident of village- Borgaon, Police chowki- Bade Amda, Distt.- Navarangpur (Orissa).
6. Sukaldher Son of Sonadher aged about 35 years, Occupation-Labour, resident of village - Borgaon, Police chowki- Bade Amda, Distt.- Navarangpur(Orissa)

A-COPY 03.11.03 Bilaspur

VERSUS

RESPONDENT : State of Chhattisgarh, Through: P.S. Nagarnar, Distt.- Baster, Jagadalpur(C.G.)

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CRIMINAL APPEAL UNDER SECTION 374 (2) Cr.P.C. READ WITH SECTION 36 (KHA) N.D.P.S. ACT 1985.

CONVICTION	SENTENCE
(1) U/S 20 (B) (II) (C), N.D.P.S. Act 1985.	10 years R.I. and fine of Rs. 1,00,000/- in default 2 years addl. R.I. for accused Ranu.
(2) U/S 20 (B) (II) (C) read with section 29 N.D.P.S. Act 1985.	10 years R.I. and fine of Rs. 1,00,000/- in default 2 years addl. R.I. for accuseds Prafull, Gangaram, Paklu, Bali & Sukaldher.

4199/03

03/11/03

Advocate

Filed on behalf of Shri

R.P.D.R.(J) 03/11/03

Being aggrieved by the order passed by Shri R.S. Sharma, Special Judge, special court N.D.P.S. Baster place at Jagadalpur, Distt.- Baster (C.G.) in spl. criminal case no. 17/2003 State Vs. Ranu and others, order passed On 16-09-2003 and this appeal is submitted herewith.

A.F.R
21.8.06

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.1165/2003

Ranu and five others

Vs.

State of Chhattisgarh

Post for Judgment: 21.08.2006

Sd-/
Dilip Raosaheb Deshmukh
Judge

A.F.R.
21.8.06

(76)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1165/2003

Before: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Ranu and five others.

Vs.

State of Chhattisgarh

Present:
Shri V.P.Gupta, learned counsel for appellants No.1 to 3.
Shri Prafull N. Bharat, learned counsel for appellants No.4 to 6
Shri M.P.S.Bhatia, learned Panel Lawyer for the State.

JUDGMENT

(Delivered on this 21st day of August, 2006)

In this appeal, the appellants have assailed their conviction under Section 20 (b) (ii) (C) read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and the sentence of rigorous imprisonment for 10 years and a fine of Rs.1 lakh each and in default to undergo rigorous imprisonment of two years awarded by Shri R.S.Sharma, the then Special Judge, Jagdalpur in Special Case No. 17/2003 vide judgment dated 16th Sept. 2003.

2. The factual matrix, in brief, is that upon receiving secret information that the appellant-Ranu had, with the assistance of 5 - 6 persons kept contraband *ganja* in plastic bags in his house, Station House Officer Alim Khan P.W.7 of Police Station Nagarnar, after recording the said information vide Ex.P.1 and also the reasons for not obtaining a search warrant vide Ex.P.23 and informing the Additional

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Superintendent of Police, Jagdalpur vide Ex.P.24, proceeded to village Kumhli along with witnesses Sadhuram P.W.1 and Mohd. Hafiz P.W.2. Upon reaching the house of the appellant, a notice was served on the appellant-Ranu informing him about the secret information received. Search of the house was conducted. As shown in the map Ex.P.26, 10 bags were found inside one of the rooms of the house of the appellant-Ranu. On weighment, it was found to be 1 quintal 3 Kgs. and 360 gms. Two samples of 30 grams of each were taken from each bag and were sealed. Remaining bags were also sealed. Seizure memo Ex.P.14 was prepared. Upon information received from the appellant-Ranu, Sonamani P.W.3, daughter of appellant-Ranu and Smt. Chanderbati P.W.4, wife of the appellant-Ranu, the remaining co-accused were also apprehended on the same day in *Jadigudapara Markel* at 5.50 P.M. and from their possession one bamboo *Kanwad* (a piece of bamboo used to balance the bags carried at both ends by balancing the bamboo on the shoulder) and rope were seized from each of the five appellants i.e. appellants No.2 to 6. The sample packets as also the remaining 10 bags of *ganja* were entrusted for safe custody at the *Malkhana* of P.S. Nagarnar to Head Constable Jankush Toppo P.W.6 who entered the details in *Malkhana* register Ex.P.27. The five *Kanwads* and rope recovered from the appellants No.2 to 5 were also entrusted and entered in *Malkhana* register Ex.P.21 A (C). On 22.4.2003 vide memo Ex.P.36 of the Superintendent of Police, Jagdalpur, 10 sample packets marked as "A to J" were sent for chemical analysis to the Forensic Science Laboratory, Raipur through Constable No. 76 Linus Kujur. The sample packets were received on 24.4.2003 at the F.S.L. Vide report Ex.P.38, it was opined that all the ten sample packets contained *ganja*. After completion of

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investigation, the appellants were prosecuted under Section 20(b)(ii)(C) read with Section 29 of the Act.

3. The appellants abjured the guilt, pleaded innocence and examined Vansingh A.W.1 and Motiram A.W.2 as defence witnesses who stated that the appellant No.1-Ranu had falsely implicated the appellants No.2 to 6 due to previous animosity. The prosecution examined as many as seven witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellants as aforesaid in paragraph 1.

4. Shri B.P.Gupta, learned counsel appearing for the appellants No.1 to 3 assailed the impugned judgment on the ground that it was not established that *ganja* was seized from the conscious possession of appellant-Ranu. It was also argued that non-compliance of sub-section (2) of Section 42 of the Act by Sub-Inspector Alim Khan P.W.7 vitiated the prosecution. It was also contended that the independent witnesses Sadhuram P.W.1 and Mohd. Hafiz P.W.2 did not support the prosecution story and the appellants No.2 and 3 could not be convicted merely on the basis of the exculpatory statement given by the family members of the appellant-Ranu.

5. Shri Prafull N. Bharat, learned counsel appearing for the appellants No.4 to 6 argued that there was total non-compliance of sub-section (3) of Section 52. Reliance was placed on *Rajesh v. State* 1989 (3) Crimes 638. It was also contended that if the testimony of Sonamani P.W.3 and Chanderbati P.W.4 was read as a whole, it did not establish conscious possession of the appellant-Ranu over the seized quantity of *ganja*. Map Ex.P.26 clearly showed that the

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contraband *ganja* and the plastic bags were found inside the room of the house of appellant-Ranu along with *Kanwads* which rendered the factum of seizure of *Kanwads* and rope from each of the appellants No.4 to 6 extremely doubtful. Reliance was placed on *Avtar Singh and others v. State of Punjab* (2002 7 SCC 419, *Gopal v. State of M.P.* (2002) 9 SCC 595 and *Gurbax Singh v. State of Haryana* 2001(3) SCC 28 while contending that non-compliance of Section 55 of the Act vitiated the prosecution.

6. On the other hand, Shri M.P.S.Bhatia, learned Panel Lawyer for the State argued in support of the impugned judgment and contended that seizure memo Ex.P.14 and seal *Panchnama* Ex.P.8 had the imprint of the seal used to seal the sample packets as also the remaining *ganja* which tallied with the impression of the seal drawn in the report of the F.S.L. Thus there was substantial compliance of Section 55 of the Act. It was also argued that although Sadhuram P.W.1 and Md. Hafiz P.W.2 did not support the prosecution story, yet the testimony of two close relatives of appellant-Ranu i.e. daughter Sonamani P.W.3 and wife Chanderbati P.W.4 proved beyond doubt that contraband *ganja* in 10 bags was recovered by the Police from the house of appellant-Ranu.

7. Having considered the rival submissions, I have also perused the record of Special Sessions Case No.17/2003 with utmost circumspection. Time and again, it has been reiterated in a number of decisions rendered by this Court that the offence under Section 20(b)(ii)(C) of the Act entails minimum severe penalty of imprisonment upto 10 years and a fine of Rs.1 lakh, and therefore, it was necessary for the prosecution to establish that the samples which were taken

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from the seized contraband were not only duly sealed by the Police Officer affecting the seizure but also by the Station House Officer of the concerned Police Station before entrusting the contraband *ganja* and the sample packets for safe custody at the *Malkhana* of the Police Station. When it is shown by the prosecution that out of the 20 sample packets which were sealed by the Sub-Inspector Alim Khan, only 10 sample packets were sent for chemical analysis to the Forensic Science Laboratory, it was absolutely necessary for the prosecution to have produced the remaining 10 sealed sample packets and the remaining quantity of *ganja* of 1 quintal 2 kgs and 760 gms. in 10 sealed bags in the trial Court. Had this been done, the learned trial Judge would have an opportunity of comparing the seals on the remaining 10 sample packets with the specimen impression of the seal affixed on the seizure memo Ex.P.14 and seal *Panchnama* Ex.P.8. It would also have enured to the benefit of the appellants inasmuch as they also could have demonstrated that the samples were not properly sealed, as required by Section 55 of the Act. Order sheet dated 20.6.2003 of the trial Court clearly shows that the remaining 10 sample packets as also the quantity of *ganja* sealed in 10 packets was not produced before the trial Judge.

8. In *Jitendra and another v. State of M.P.* 2003 S.A.R. (Criminal) 902, it was held by the Supreme Court that in a trial for an offence under Section 20 (b) of the Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and *ganja* were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There was no explanation for this failure by the

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prosecution to produce the articles before the trial Court. It was held that since the Panchas had turned hostile, the seizure *Panchnama* was nothing but a document written by the concerned Police Officer. It was further held that failure of the prosecution to produce the contraband *ganja* and the remaining sample packets before the trial Court was not a mere procedural irregularity and caused prejudice to the accused. In the present case, non-production of the 10 bags of *ganja* and the 10 sealed sample packets before the trial Court amounted to suppression of the best evidence by the prosecution which has caused serious prejudice to the accused. No explanation for failure to produce the aforesaid articles before the trial Judge by the prosecution is forthcoming. This circumstance strongly militates against the prosecution.

9. Heavy burden was on the prosecution to establish that the seized articles were properly sealed and kept in proper custody till it reached the F.S.L. for analysis. It is imperative on the prosecution to prove that the sanctity of the case property had at no point of time been destroyed or violated right from the time of its seizure upto the stage of its receipt in the office of Chemical Examiner. Although Sub-Inspector Alim Khan P.W.7 stated in para 4 that after recovering 1 quintal 3 kgs. and 360 gms of *ganja* kept in 10 bags from the house of appellant-Ranu and getting its weighment done he had lifted two samples of 30 grams from each bag and had sealed each sample packet and the remaining *ganja* separately and had also prepared seal *Panchnama* vide Ex.P.8 which had the imprint of the seal used by him. However, in para 8, it was not stated by him that the seized bags containing *ganja* and the sample packets were entrusted to *Malkhana Moharrir* Jankush Toppo P.W.6 in a sealed condition. Prosecution

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examined Jankush Toppo, *Malkhana Moharrir* of P.S. Nagarnar as P.W.6 who did not state that he had received 20 sample packets each containing 30 grams *ganja* in a sealed condition for safe custody at the *Malkhana*. He proved the entry in *Malkhana* register Ex.P.27(C) which also does not show that the ten bags containing *ganja* and the 20 sample packets were entrusted for safe custody in a sealed condition. This renders the testimony of Sub-Inspector Alim Khan P.W.7 untrustworthy and creates a serious doubt that the sample packets were sealed at the time of affecting seizure vide Ex.P.14. Sub-Inspector Alim Khan P.W.7 also did not state that as Station House Officer of P.S. Nagarnar, before handing over the 10 bags of contraband *ganja* and the 20 sample packets for safe custody in P.S. Nagarnar to Head Constable Jankush Toppo P.W.6 he had affixed his seal on the 20 sample packets. Thus, there has been total non-compliance of Section 55 of the Act. A vital link evidence is thus missing in the present case.

10. The map prepared at the spot by Sub-Inspector Alim Khan P.W.7 vide Ex.P.26 clearly shows that 5 *Kanwads* with two bags attached to each were kept inside the house of the appellant-Ranu. This clearly renders his testimony of seizure of one *Kanwad* and a piece of rope from each of the appellants No.2 to 6 on the same day from another place i.e. *Jadigudapara Markel* doubtful. Sub-Inspector Alim Khan P.W.7 admitted in para 12 that merely on the basis of the information given by the appellant-Ranu and his family members, he had proceeded against the appellants No.2 to 6. Sonamani P.W.3 and Chanderbati P.W.4 deposed that on that day one Gangaram and Farsu had kept the contraband *ganja* inside their house. They did not name the appellants No.2, 4, 5 and 6. It does not emerge from their

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testimony that Gangaram and the appellant No.2 were the same person. Both these witnesses did not identify the appellant No.2 in Court as the person who had kept the *ganja* in the house of the appellant-Ranu, Sub-Inspector Alim Khan stated that if the family members of appellant-Ranu had named any persons other than appellants No.2 to 6, he would have proceeded against those persons. Thus no effort was made by him to independently investigate as to who had kept the 10 bags containing *ganja* at the house of appellant-Ranu. Merely on the exculpatory statements of an accused or his relatives no inference can be drawn against the appellants No. 2 to 6. In the facts and circumstances mentioned above, it becomes highly doubtful that the appellants No.2 to 6 had kept the contraband *ganja* in the house of appellant-Ranu on 21.4.2003. As stated earlier, the spot map Ex.P.26 prepared by Sub-Inspector Alim Khan shows that 5 *Kanwads* with two bags of *ganja* attached to it were found inside the house of the appellant-Ranu. In this view of the matter, the prosecution has utterly failed to prove the complicity of the appellants No.2 to 6 for the contraband *ganja* seized from the house of the appellant No.1-Ranu.

11. It is pertinent to note that the entry dated 21.4.2003 in the *Malkhana* register Ex.P.21 A (C) does not show that 20 sample packets were entrusted in a sealed condition to Head Constable Jankush Toppo P.W.6. It, however, shows an entry that on 23.4.2003, 10 sample packets in a sealed condition were sent to F.S.L., Raipur but no evidence is led to show who sealed those ten sample packets and when. If the sample packets had not been entrusted at the *Malkhana* in a sealed condition and there was no evidence to show the compliance of Section 55 of the Act the mere endorsement dated 23.4.2003 in the

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Malkhana register Ex.P.21 A (C) does not help the prosecution in any manner especially because Head Constable Jankush Toppo P.W.6 also did not depose in para 2 that on 23.4.2003, the sample packets were sent through Constable Nilus Kujur in a sealed condition to the F.S.L. Non-compliance of Section 55 of the Act, would thus have a bearing on appreciation of evidence regarding sealing of sample packets at the time of seizure or before entrustment at the *Malkhana* at P.S. Nagarnar and would create a serious dent in the prosecution story and render the testimony of Sub-Inspector Alim Khan P.W.7 doubtful.

12. Possession is the core ingredient of an offence under Section 20(b)(ii)(C) of the Act. It is the duty of the prosecution to establish that the 10 bags of contraband *ganja* were found in the exclusive and conscious possession of the appellant No.1. Sadhuram Kotwar P.W.1 and Mohd. Hafiz P.W.2 who were independent witnesses and had accompanied Sub-Inspector Alim Khan to village Kumhli did not support the prosecution story and stated that they were called at Police Station and had signed the documents there. Both denied the seizure of 10 bags of *ganja* from the house of appellant-Ranu in their presence. Shri M.P.S.Bhatia, learned Panel Lawyer for the State laid stress on the testimony of Sonamani P.W.3 and Chanderbati P.W.4 while arguing that these two witnesses were close relatives of the appellant No.1-Ranu and their testimony establishes that *ganja* was seized from the conscious possession of the appellant-Ranu. However, this argument cannot be accepted. If reliance is to be placed on the testimony of Sonamani P.W.3 and Chanderbati P.W.4, their testimony has to be read as a whole. Sonamani P.W.3 and Chanderbati P.W.4 stated that two persons namely Gangaram and Farsu had kept the bags in their house saying that it contained *Mahua*. The testimony of

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Sonamani P.W.3 does not show that at that time the appellant-Ranu was present. Chanderbati P.W.4 also stated that only two or three bags containing *Mahua* was kept in her house by Gangaram and Farsu. In cross-examination, she admitted that she did not see as to who had kept the *ganja* in her house. It appears that both these witnesses in order to shield appellant-Ranu have tried to pass the blame on Gangaram and Farsu. As already stated, their testimony does not show that Gangaram and appellant No.2 were the same person. In this view of the matter, the testimony of Sonamani P.W.3 and Chanderbati P.W.4 does not come to the aid of the prosecution in proving conscious possession of appellant-Ranu over the ten bags containing contraband *ganja* allegedly seized from his house.

13. Sub-Inspector Alim Khan P.W.7 admitted in cross-examination paragraph 12 that at the time of search, other family members of appellant-Ranu were also present in the house. He stated that since he had received secret information only about appellant-Ranu, he did not deem it fit to enquire whether any other member of the family had kept the contraband *ganja* inside the house. It was admitted in paragraph 13 that villagers were watching the proceedings from a distance but he did not ask any villager to be a witness of seizure. He also admitted that wife and children of appellant-Ranu were also present in the house along with other family members. Testimony of Sonamani P.W.3 and Chanderbati P.W.4 shows that they were the persons who had received the bags kept in their house by Gangaram and Farsu. Sub-Inspector Alim Khan did not deem it necessary to enquire independently as to who had kept the contraband *ganja* in the house of appellant No.1 and merely implicated the appellants No.2 to 6 on the basis of the exculpatory statement made by the family

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members of appellant No.1. The spot map Ex.P.26 also shows that contraband *ganja* was kept along with 5 *Kanwads* inside the house of appellant No.1. There is no evidence on record to show that the house in question was in exclusive possession of appellant No.1-Ranu since it was admitted by Sub-Inspector Alim Khan that other family members as also the wife and children of appellant-Ranu were also present in the house. Non-examination of independent witnesses though admittedly present at the spot also renders the testimony of Sub-Inspector Alim Khan doubtful. The evidence adduced by the prosecution is thus wholly insufficient to show that what was seized was in the conscious possession of the appellant No.1 alone.

14. The prosecution did not examine Constable Nilus Kujur No.70 who was entrusted with 10 sample packets vide memo dated 22.4.2003 Ex.P.36 by the Superintendent of Police, Jagdalpur for taking to the F.S.L. Neither the entry in *Malkhana* register Ex.P.21 A (C) nor the seizure memo Ex.P.14 shows that the sample packets had any marks. It is also not shown by the prosecution as to who had put the markings "A to J" on the ten sealed sample packets sent for chemical analysis to the F.S.L. Seizure memo Ex.P.14 shows that the ten bags were marked as "A to J" but not the sample packets. It is thus not clear as to which sample packet corresponded to which bag of contraband *ganja* and who had put the markings "A to J" on the ten sample packets before sending it to the F.S.L. Non-examination of Constable Linus Kujur, who took the sample packets for chemical analysis, also shows that an important link evidence in this case is missing.

15. Thus, the following facts emerge from the above discussion:

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A) Witnesses Sadhuram P.W.1 and Mohd. Hafiz P.W.2 did not support the prosecution story regarding seizure of 1 quintal 3 kgs. and 360 grams of *ganja* from the conscious possession of the appellant No.1.

B) Independent witnesses i.e. villagers though admittedly present at the time of the search and seizure by Sub-Inspector Alim Khan were not cited as witnesses.

C) Spot Map Ex.P.26 renders the prosecution story relating to complicity of appellants No.2 to 6 in the offence highly doubtful.

D) There is no independent and reliable evidence on record to show that appellants No.2 to 6 had kept the contraband *ganja* in 10 bags at the house of appellant-Ranu.

E) There is total non-compliance of Section 55 of the Act.

F) It is extremely doubtful that the contraband *ganja* in 10 bags and the 20 sample packets were entrusted for safe custody at the *Malkhana* in a sealed condition.

G) Non-examination of Constable Linus Kujur No.70 who had taken the sample packets to the F.S.L. also makes it doubtful that the sample packets were sealed on 23.4.2003 before entrusting them for delivery at the F.S.L.

H) Non-production of the remaining 10 sample packets and the 10 bags of contraband *ganja* before the learned trial Judge also renders the prosecution story doubtful that the sample packets were duly sealed as contemplated under Section 55 of the Act.

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I) The testimony of Sonamani P.W.3 and Chanderbati P.W.4 does not show that the appellant No.1-Ranu had consciously received 10 bags of *ganja* from some persons on 21.4.2003.

J) The testimony of Sub-Inspector Alim Khan P.W.7 in paras 12 and 13 creates a serious doubt that the contraband *ganja* was recovered from the conscious possession of appellant-Ranu since no efforts were made to enquire whether any other family member, wife or children were responsible for the possession of *ganja* recovered from the house of the appellant No.1-Ranu.

K) There is no evidence to show as to when the markings "A to J" were put on the ten sample packets sent for chemical analysis to the F.S.L. since seizure memo Ex.P.14 did not show that any markings were put on the sample packets.

L) *Malkhana* register Ex.P.21 A (C) and the testimony of Head Constable Jankush Toppo P.W.6 creates a serious doubt that the sample packets and the remaining *ganja* were kept inside the *Malkhana* of P.S. Nagarnar in a sealed condition.

M) The specimen impression of the seal which was alleged to have been used for sealing the sample packets is also not shown to have been deposited along with the property in *Malkhana* vide Ex.P.21 A(C) i.e. the *Malkhana* register. Thus, an important link evidence is missing in the present case.

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16. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that in view of the above mentioned facts emerging from the evidence the prosecution has utterly failed to establish the guilt of the appellants beyond doubt. As held by the Apex Court in *Valsala v. State of Kerala* 1994 (1) M.P.W. 137 although possession of contraband *ganja* in huge quantity is a menace to the society, but in the absence of satisfactory proof, the appellants cannot be convicted.

17. In the result, the appeal is allowed. Conviction of the appellants under Section 20(b)(ii)(C) read with Section 29 of the Act and the sentence awarded thereunder is set aside. The appellants are acquitted of the charge under Section 20(b)(ii)(C) read with Section 29 of the Act and shall be set at liberty forthwith, if not required in any other case.

Sd-/
Dilip Raosaheb Deshmukh
Judge